Volume 76 Number 2

Federal PROBATION
a journal of correctional philosophy and practice

I Had a Dream: Alternatives To Prison Solution Program (APS) in the Southern District of California

Nancee S. Schwartz
Diversion Defense Counsel, Southern District of California

I HAD A DREAM….
It was not nearly as lofty a dream as Dr. King's, where all persons might someday be treated equally. Instead, I dreamt that one day the federal criminal justice system might offer a means of rehabilitation as an alternative to conviction and custody.

My dream—a vision really—became a reality with an attempt to have our district create a reentry program. Our chief judge supported the effort, but at the time, the probation chief was unwilling to implement such a program. However, that did not discourage me; it led me instead in a different direction. It caused me to look at implementing change prior to conviction as opposed to post-conviction.

It made sense that if we could replace custody and conviction with education, employment, and drug treatment by providing accountability, resources, and support, we could change the direction of a client's life rather than saddling him or her with a felony conviction and a custodial sentence that would do little towards providing tools for change.

With a pretrial services chief and supervisor who shared my vision, an assistant U.S. attorney willing to take a chance, judges who believed in offering a second chance, and five very talented and committed pretrial services (PTS) officers, we began the Southern District of California's Alternatives To Prison Solution program (APS). We wanted to offer an alternative to those whose criminal act was aberrant and/or the result of present factors in his or her life that, if left unchanged, would create a likelihood of recidivism. It is a program where the client pleads guilty, but the plea is not entered and sentencing is deferred for one year. If the client successfully completes the program, the complaint is dismissed.

The clients are designated by the U.S. Attorney's office. Post-arrest, the client is given a notice to appear (NTA) and is transported to pretrial services. There an officer interviews the client, as would normally be the case with any client prior to his or her first appearance. Defense counsel also interviews each client before or after the pretrial services interview but prior to the PTS officer inquiring into facts of the arrest or case to ensure that the client wants to proceed (participation requires a guilty plea) and that no rights have been violated. In most cases, the client has waived and admitted to committing the offense. A personal surety bond is set in each case, secured by the client's signature. The notice to appear is generally set for the day following the client's delivery to pretrial services. Where the need for services or recourses is immediate,

we have the matter set for bond on the same day.

Within usually a week after the first appearance, we appear before the diversion judge for a change of plea and entry into the diversion program. The Contract for Participation is signed by the client, the defense attorney, the assistant U.S. attorney (AUSA), the pretrial services supervisor, and the magistrate judge. A plan of supervision and goals is established. The plea is held for one year, during which time the client remains under supervision of the court and pretrial services. If the client successfully completes the program, his or her complaint is dismissed. If, conversely, the client is terminated from the program or withdraws (participation is voluntary), the matter is set for bond revocation, new counsel is appointed, and the client's case is set for sentencing in the normal way.

The degree of supervision is determined on a case-by-case basis depending on the needs of the client. We have learned that one size does not fit all. Cases are staffed on an ongoing basis and the client's degree of supervision may be adjusted based on his or her performance or needs.

We developed the program utilizing evidence-based practices, many years of experience, and models of successful reentry programs and drug courts. It took close to two years to implement the program, with the first participants beginning in November 2010. We have had 227 clients enter the program. Thus far we have had 111 graduates. Due to the staggering of entry dates, graduations occur monthly. Including those who have graduated and those who are still participating, a total of 16 clients have been terminated; 10 due to noncompliance and 6 due to new criminal conduct.

In state court, a stayed sentence serves as a deterrent to reoffend; in federal court, a deferred entry of a felony can do the same. More so, the "hammer" so to speak of a felony keeps the client vested in his or her success. Participation is voluntary and we find that what begins as a means to stay out of custody evolves, with each success, into an opportunity to implement positive change. "Just tell me I won't go to jail" is soon replaced with "I can't wait to tell the judge that I'm clean, I have a job…." We see shorts and tee-shirts replaced by slacks and shirts. The clients learn the rewards that come from positive change. It is a collaborative effort. It works because the defense, the prosecutor, pretrial services, and the court are vested in the same outcome. It has caused all of us to examine how we have traditionally performed our jobs. I was shocked to hear myself suggest that a few days in custody might serve my client well. At a recent revocation hearing, I questioned a client's commitment and his appropriateness to continue in the program. I announced to the court, "I find myself sounding more like a prosecutor than defense counsel." As the AUSA addressed the court, she began with, "And at the expense of sounding like a defense lawyer…." She convinced the judge to give the defendant another chance, stating, "This is a program of hope. We look at the whole person." Pretrial services officers have had to reexamine how they have responded to noncompliance. We have all had to step out of our zones of comfort, but isn't that always required for change?

Many years ago, in approximately 1986, I had a sentencing hearing before the late John Rhoades. It was a large distribution of marijuana case with a client with a substantial history of substance abuse. He had been in and out of state custody but had never addressed his drug use. I proposed a non-custodial sentence that would allow placement in a residential drug treatment facility. The judge had never ordered a drug program as an alternative to custody. He gave the client an option: federal custody or twice the time in a residential facility followed by out-patient treatment. My client chose the latter and it stopped a pattern. It is no surprise to those who had the honor to appear before him that Judge Rhoades would think outside the box and take a risk. My point is: to move forward, we must think forward.

At the time, such a sentence was quite unusual. Today, it is a common request at sentencing. We have seen the same results in APS. We have been able to stop a pattern and do so with the benefit of the client not proceeding through life with a felony conviction, which we know is an impediment to success. Isn't it time that all of us involved in the federal criminal justice system address the need for rehabilitation and the roles we can play in effecting a change? Until we do, it is unlikely we will affect the rate of recidivism. And why not begin at the beginning, with

pretrial release and the possibility of diverting a conviction?

When we began the program, we faced a number of skeptics. I heard that some thought that federal court was not the place for "social work," and "When did federal court become drug court?" After a year and a half, the cynicism seems largely replaced by kudos. It is time for rehabilitation to play a real role in federal court and not be left to a prison system that has failed miserably.

At the recent swearing in of the Honorable Cathy Bencivengo to the U.S. District Court, she was quoted on the role she played as a diversion magistrate judge:

> To me it is an opportunity to offer hope and help to someone to enable him or her to change their destiny and in some cases the destiny of their children. When someone violates the law, our options are somewhat limited. We can punish more or less severely based on the circumstances, but we couldn't give the person a "do over." We hope that the punishments we impose provide a lesson to modify future behavior, but having a federal felony conviction is not going to enhance anyone's life. For the diversion candidates, we have the option of granting that do over, to give them a chance to have a different outcome. The program never treats the defendant like a victim—poor you, your life has been hard so we are going to let you off this time. The program opens a door but each defendant has to work hard to get to the other side. We all reinforce the foundation of the program; the defendant is responsible for his or her outcome. The defendant has to change his or her life direction. All our help and positive support is nothing if the defendant does not accept that he is responsible for where he is in life and commit to moving in a new direction. I have watched people make painful life changes (particularly in the area of drug and mental health treatment) and I have seen them inspired by their personal success to keep at it when it gets hard, to admit when they backslid and reaffirm their commitment to doing better. I have seen people reunited with families and heard them say they want to be a positive role model for their children, had parents tell me we saved the defendant's life. The Diversion Program gives people a chance to learn to respect themselves and get the respect of others in response, to learn that trust can be earned and reestablished where it was destroyed by past lies and behaviors. I believe there is a place for this kind of program in the effective administration of justice as an alternative to prison for the appropriate candidates.

Status hearings are scheduled throughout the participants' diversion period. The frequency of hearings is determined by the clients' need for accountability. Our diversion judges applaud progress and assess goals. Noncompliance is addressed and sanctions are immediate. Graduations are nothing less than inspiring. I listen in awe as clients thank their pretrial services officers for their support and talk about achieving goals and setting new ones. They speak with pride of mending bridges, acquiring GEDs, and receiving first paychecks. We celebrate each success.

The diversion program is a work in progress. We have learned a lot. We know that addressing addiction is a priority, but that our clients first must have food, clothing, and shelter. We know the value of family support. We work hard—sometimes harder than our clients. We have suffered some setbacks but many, many more successes. We have laughed and we have cried. Mostly, we have made a difference. When was the last time any of us felt like that?

I have learned a lot in a year and a half. I know that by working together we can begin to fix a system in need of fixing. I have learned that a week in custody might do greater good than a month of hugs and leniency. I have learned, and have said, "Maintaining the integrity of this program has to mean more to me than any one client."

Our program is unlike programs in any other federal court. I credit its unique features and its success to an exceptional group of stakeholders; a progressive prosecutor, a talented, hard-

working pretrial services supervisor and group of pretrial services officers, and magistrate judges who share a vision and see the valuable role they can play in implementing positive change.

Diversion works and has a place in our federal criminal justice system. It might not work in every district in the exact form we have created here in the Southern District of California, but even in districts outside that wonderful, quirky, trend-setting Ninth Circuit, there is a way of making it work.

Many of our clients come to us with years of dysfunction and a myriad of wounds. We are not so naïve as to believe that in a year we can change every life, but we have made a start.

I still have a dream….

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Published by the Administrative Office of the United States Courts www.uscourts.gov
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